

Two Windows into Innocence

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By now the story is sadly familiar. Rickie Johnson served twenty-five years in prison for a rape he did not commit. He was conclusively exonerated by DNA testing in 2008 thanks to the Cardozo Innocence Project.¹ Another man had committed the rape that cost Johnson twenty-five years of freedom. The cause of the error? Shoddy police work had resulted in a false eyewitness identification.

On July 12, 1982, a man raped a woman, twice, in her northwest Louisiana home. He told her that his name was Marcus Johnson. The police could find no record of a Marcus Johnson but did have a record of Rickie Johnson, who was on probation for a misdemeanor traffic violation. Police created a photo array with only three photos, with Johnson's photo in the middle. The victim picked Johnson's photo even though he had a prominent gold tooth, a fact that she did not mention in her initial identification of the rapist. Even though Johnson proclaimed his innocence from the beginning, the police never investigated another suspect. The police later conducted a line-up that had five men, with Johnson again in the middle. The victim picked out Johnson, but, of course, she had already identified his photo.

At trial, the only evidence against Johnson was the victim's testimony that she was "positive" he was her rapist and the fact that he was the same blood type as the rapist. No DNA testing could be done in 1982; that world now seems almost barbaric in its treatment of serological evidence. The defense presented alibi witnesses, including a dentist. The jury convicted Johnson, and he was sentenced to life in prison without parole. The twenty-five years he served constitute roughly half of a man's adult life.

It is now well-established that innocent defendants are convicted of crimes in the United States at a rate far higher than we smugly thought when Johnson was convicted in 1982. The break-through was DNA testing that allows us to be certain, in some cases, that an innocent defendant was convicted. The number of proven wrongful convictions is well into the hundreds, if not one thousand. The Cardozo Innocence Project, as of April 5, 2010, had alone exonerated 252 innocent men and women.² There are over sixty innocence projects nationwide.³

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¹ See The Innocence Project, *Know the Cases: Rickie Johnson*, <http://www.innocenceproject.org/Content/1120.php> (last visited Apr. 5, 2010).

² See The Innocence Project, *The Innocence Project – Home*,

Estimating the number of innocent defendants who have been convicted of a serious crime is a daunting, and perhaps impossible, task. In my 2008 book, I drew on a statistical model and two studies of English convictions to produce a rough overall estimate that two percent of convictions are of innocent defendants.⁴ After the book was published, I became aware of Michael Risinger's work in this area. He has made a compelling argument that it is a fool's errand to attempt an estimate of a general error rate, both because we lack an acceptable methodology and because the error rate will vary dramatically by category.⁵ So, for example, the error rate in armed robbery cases, where identification is a critical issue, will be much higher than in cases of failing to file income tax returns, where it should be almost zero.

While despairing of the possibility of arriving at a general estimate, Risinger has developed a rigorous methodology for estimating the error rate in a narrow category of cases—rape-murder capital cases. The reason to use rape-murder is that the serological evidence in rape cases usually provides an opportunity for DNA testing that can exonerate an innocent prisoner. His methodology produced a conservative minimum error rate of 3.3%, with a “fairly generous maximum” of 5%.⁶ Thus, of the 319 capital rape-murder convictions that Risinger studied, from 10 to 16 of the men sentenced to die were innocent.

Despite Risinger's wisdom about not attempting a global estimate of how many innocents are convicted, I continue to try to at least surround the problem. We do know some things for certain. An Institute of Justice monograph published in 1999 contained a study of roughly 21,000 cases in which laboratories compared DNA of the suspect with DNA from the crime scene. Remarkably, the DNA tests exonerated the prime suspect in 23% of the cases. In another 16%, the results were inconclusive. Because the inconclusive results must be removed from the sample, the police were wrong in one case in four.⁷ *The prime suspect was innocent in one case out of four!*

To be sure, that DNA study probably overstates the error rate in arrests overall. When the identity of the actor is known, and the argument is over whether what he did is a crime, there is no risk of convicting the wrong person and thus no

<http://www.innocenceproject.org/> (last visited Apr. 5, 2010).

³ See The Innocence Project, *Other Projects*, <http://www.innocenceproject.org/about/Other-Projects.php> (last visited Apr. 5, 2010).

⁴ See GEORGE C. THOMAS III, *THE SUPREME COURT ON TRIAL: HOW THE AMERICAN JUSTICE SYSTEM SACRIFICES INNOCENT DEFENDANTS* 39–40 (2008). For a review of this book, see Susan A. Bandes, *Protecting the Innocent as the Primary Value of the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 413 (2009) (book review).

⁵ See D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 782–83, 788 (2007).

⁶ *Id.* at 778–79.

⁷ EDWARD CONNORS, ET AL., *CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL*, NATIONAL INSTITUTE OF JUSTICE REPORT 20 (1996).

reason to conduct a DNA test. Moreover, in cases where the police have a confession and eyewitnesses, they might (but I would not) decide to forgo sophisticated DNA testing.⁸ These cases will not, of course, appear in the DNA database, making the error rate in all cases lower than that found in the Institute of Justice study. Counterbalancing the scale, at least to some extent, is the reluctance of prosecutors and police to go to the trouble and expense of DNA testing unless they were relatively certain that the suspect was guilty. A one-in-four error rate in those cases is pretty scary.

A piece of the puzzle that is often ignored is the category of defendants who plead guilty. That group constitutes 97% of all felony convictions occurring within one year of arrest.⁹ If the rate of innocents pleading guilty were close to zero, as one might think it would be, then the problem of wrongful convictions is still a problem—that perhaps 16 of the men convicted of rape-murder were innocent is a scandal that we must address—but perhaps we would be willing to take less drastic steps to ameliorate the problem of wrongful convictions in non-death cases. Unfortunately, the assumption that innocent defendants will insist on a trial to vindicate their innocence, while superficially attractive, does not stand up to close scrutiny. As Josh Bowers has pointed out, many defendants innocent of the crime charged will have rap sheets, often long rap sheets, and are quite happy to plead guilty in exchange for a light sentence.¹⁰ And even an innocent defendant without a record might consider it in his best interest to cut his losses and plead guilty to a misdemeanor in exchange for probation or time served before bail was posted. That innocent defendants plead guilty sometimes even to the most serious crimes can be seen in the Innocence Project data. Nine of the first two hundred exonerees had pled guilty, seven to murder or rape-murder, and two to rape.¹¹ The frequency of guilty pleas by innocent defendants is bound to increase as the severity of the charge declines.

One of the English studies I mentioned earlier involved guilty plea convictions. McConville and Baldwin concluded that two percent of the guilty pleas were of doubtful validity.¹² As there were roughly two million felony cases

⁸ Something similar occurred in *District Attorney's Office for the Third Judicial District v. Osborne*, 129 S. Ct. 2308, 2313 (2009). The prosecutor had a test conducted that eliminated 95% of the population, but chose not to seek a more precise result even though Osborne had not confessed. One of my students defended this as a plausible litigation strategy, but why wouldn't the prosecution want to know for sure that Osborne was guilty? My student's reaction strikes me as an example of the adversarial mess that infects our criminal justice system. I railed against this tendency in THOMAS, *supra* note 4.

⁹ United States Department of Justice, *Office of Justice Programs, Bureau of Justice Statistics, Criminal Case Processing Statistics, Summary Findings, Felony Defendants*, <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=2211>.

¹⁰ Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1121–22 (2008).

¹¹ Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 74 (2008).

¹² MICHAEL MCCONVILLE & JOHN BALDWIN, *COURTS, PROSECUTION, AND CONVICTION* 66 (1981).

filed in 2006,¹³ if two percent result in conviction of an innocent defendant, 40,000 wrongful felony convictions occur per year. If we cut the estimate in half, to be conservative, 20,000 innocent defendants are convicted each year. We can cut it in half again and still have 10,000 wrongful convictions per year. This is, I believe, an intolerably high number of errors.

What can be done? First, we need an idea of what causes defendants to be charged and convicted of crimes they did not commit. Once again, the Innocence Project provides invaluable data. The four principal causes of the first 220 exonerations, along with the percentage of cases in which the cause appeared, were: mistaken eyewitness identifications, 77%; failed science, 52%; false confessions, 23%; and lying informants, 16%.¹⁴ The numbers add to considerably over 100%, of course, because quite a few cases have more than one cause.

An American Bar Association (ABA) ad hoc committee produced a monograph in 2005 that offers excellent ideas for improvement in several areas.¹⁵ My 2008 book sought to go beyond the ABA recommendations with more fundamental reforms. In this essay, I want to explore two reforms that I only lightly touched on in my book: improving the eyewitness identification procedure and giving defendants a right to discover the State's case on roughly the same terms as discovery is available to civil litigants. These two reforms are, I think, logically paired. We begin by improving the eyewitness identification procedure. But because we know that even significant reform in these procedures will sometimes produce a mistaken identification, more is needed. If a defendant also has a right to take the deposition of the person who made the identification, it will permit defense counsel to highlight the flaws in the identification procedure.

Moreover, my proposed discovery reform will serve as a backstop in states that do not adopt eyewitness reforms or that adopt inadequate reforms. Defendants in those states can mitigate the harm of flawed identification procedures by deposing the witnesses who made the identification. I appreciate the difficulties that depositions would pose for victims, especially children and rape victims, by potentially forcing them to testify twice. I will return to this issue in Part IV.

Finally, my proposed discovery reform will offer benefits beyond the eyewitness identification context. There are likely many occasions when an innocent defendant would benefit from deposing a witness who was not an eyewitness. Jailhouse snitches are an obvious example.

The bottom line for my essay is three-fold. I will recommend improvements in eyewitness procedures along the lines of those adopted by New Jersey in 2001

¹³ National Center for State Courts, *Examining the Work of State Courts, Criminal Caseloads*, <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=1278>.

¹⁴ See The Innocence Project, *The Causes of Wrongful Conviction*, <http://www.innocenceproject.org/understand/>.

¹⁵ See A.B.A. CRIMINAL JUSTICE SECTION, *ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY—REPORT OF THE ABA CRIMINAL JUSTICE SECTION'S AD HOC INNOCENCE COMMITTEE TO ENSURE THE INTEGRITY OF THE CRIMINAL PROCESS* (Paul Giannelli and Myrna Raeder eds., 2006).

and North Carolina in 2008. Because these procedures are quite complex, and in North Carolina require that the administrator not know which foil is the suspect, my second recommendation is that eyewitness identifications be supervised not by police but by a judicial officer. In the federal system, that task could be done by federal magistrates. Most states provide preliminary hearings, with judges who decide whether the State has probable cause to believe that the defendant committed the crime with which he is charged, and it seems to me that those judges would be the ideal actors to supervise eyewitness identifications. My third recommendation would provide additional protection for innocent defendants: I believe that states should adopt defense discovery of the prosecution's case along the lines of the procedures already in use in states like Florida, Iowa, and Vermont.

I. IMPROVING EYEWITNESS IDENTIFICATION PROCEDURES

In the last twenty years, a crescendo of criticism has been leveled at the traditional procedures used to collect eyewitness identifications. Much scientific research has been conducted to isolate the reasons why eyewitness identifications fail so often and to identify reforms that will make them more reliable. It is beyond the scope of this essay to survey the voluminous criticisms and research in detail, though I will summarize the problems and some of the solutions identified so far.

The problems can be grouped into three categories. The first, and most obvious problem, is the way police conduct the procedures. Here, I cast no aspersions. I am not assuming that police set out to rig the identification. After all, the police are as committed as any actor in the system to identifying the actual perpetrator, not someone who just resembles the perpetrator. But police are human. They believe the suspect in the line up or photo array is the perpetrator, and there are many ways in which they can inadvertently signal the witness. We saw in Johnson's case that the initial photo array used only three photos with his in the middle. More subtly, even if the police use enough "fillers"—someone not a suspect who fills out the lineup—the officer can, by tone of voice signal the witness who has picked out the "wrong" person.

John Farmer was the Attorney General of New Jersey who implemented procedures designed to reduce errors in eyewitness identification. He told me that the police resisted the changes, not because they were indifferent to errors but precisely because they did not think they made errors in any non-trivial number.¹⁶ When they went to the trouble to conduct an identification procedure, they believed that the perpetrator was in the lineup.

The second problem is the set of procedures that developed to collect the identifications. It might seem obvious that the best way to have the victim decide whether the suspect is the perpetrator is to put him in a lineup with four other

¹⁶ Interview with John Farmer, Center for Law & Justice, Rutgers University School of Law (May 22, 2009).

individuals who look similar. What is obvious, however, turns out not to be correct. The central, though not the only, problem with line-ups or photo arrays is that witnesses approach them as if they are a multiple choice question without the answer "none of the above." That is, witnesses assume, perhaps unconsciously, that the perpetrator must be in the line up or photo array, and they pick the person who most closely resembles their memory of the perpetrator.

But the most fundamental, and least obvious, problem is the inability of humans to identify others from memory. This problem, it turns out, has two dimensions. Humans are not very observant and thus pay little attention to the details that set one human apart from all the others. But we now know that the problem is far deeper. We now know that human memory is a complex, shifting, and ultimately unreliable source of information. As Steven Wallace put it in 2005:

[M]emory is not an exact faculty, a tape recorder replaying an imprinted vision of exactly what happened at the time in question. The idea that one may possess a "truthful" memory that is a passive or literal reproduction of reality has been debunked. If memory is a deep retention pond into which we dive when seeking to recall our past, there are surely other elements in the water that prevent us from seeing what's there with clarity.¹⁷

The unreliability of human memory can be easily demonstrated. Different observers will describe the same event differently. Wallace's example: "should a mime chase a nude through a criminal law class, everyone will report it differently on the inevitable quiz that follows."¹⁸ If the same event is reported differently by different observers moments after the event occurs, then it is little wonder that a crime victim, frightened for his or her life, flooded with adrenaline, will have a poor recall of the perpetrator's features that were observed days, weeks, months, or years earlier.

I will indulge a personal anecdote. I had only one criminal client whom I believed to be innocent. I was, however, unable to prevent a jury from convicting him of misdemeanor child abuse. The key part of the case was the testimony of a doctor that the blows inflicted by my client could not have caused the bruises in question. When pressed by the district attorney, the doctor grudgingly admitted that it was possible, though not likely, that the blows caused the bruises. Yet the jury convicted.

The case took place in 1979, and I have told this story probably fifty times to illustrate different points. It is a good story. It is also thirty years old. Recently, I published a version of the story and needed a citation that was more legitimate than "Thomas's memory of 1979." I was stunned when I read the transcript of the

¹⁷ Steven Wallace, *The Puzzle of Memory: Reflections on the Divergence of Truth and Accuracy*, 79 FLA. B.J. 24, 24 (2005).

¹⁸ *Id.*

trial.¹⁹ It bore little resemblance to the memory I had constructed. I remembered, quite vividly, that the doctor was my witness and wilted on cross-examination by the prosecutor that included questions such as, “are you an expert in the healing of human flesh?” and, “doctor, have you published any papers about healing of flesh?” and, “have you even read any research in this field?” But the reality was that he was the *prosecution’s* witness and did not express an opinion about the source of the bruises on direct examination. I elicited that on cross and he wilted on re-direct. The prosecutor asked none of the clever questions I recalled him asking. Instead, he just bullied the witness into admitting that nothing is certain.

If I had been given truth serum and asked about this case prior to reading the transcript, I would have told a false story that would have tested as the truth *because I believed it was true*. I had constructed a memory that made me feel better about losing the case. How many times have each of us similarly constructed memories that are only marginally related to the truth? In sum, human memory is very much like the unreliable narrator that novelists use.²⁰ We get a story, all right. It is just that we have no idea how closely the story connects to the truth.²¹

So those are the sets of problems inherent in the way lineups and photo arrays have been conducted for many, many years. As social scientists reported evidence of the frailties of the current system, scholars and advisory groups began to recommend changes that would remedy these defects. To repeat these recommendations in detail would simply duplicate many other sources. But I will offer two examples.

I begin with one of the earliest, perhaps *the* earliest, state-wide reform, that of Attorney General John Farmer in New Jersey. Unlike the situation in many states, the New Jersey Attorney General has line authority over not only the state police, but also all police departments in the state. In April, 2001, Farmer ordered that all lineups should, where practicable, be conducted in accordance with a set of procedures that took account of the existing social science research into eyewitness identification procedures.²²

First, inadvertent signaling should be avoided by having the lineup or photo array conducted by someone other than the primary investigator in the case.²³

¹⁹ Transcript of Record, *Tennessee v. Powell* (1977) (No. 387) on-file with the author.

²⁰ My favorite unreliable narrator novel is JOHN BANVILLE, *THE BOOK OF EVIDENCE* (1989).

²¹ Before I am set upon by the post-modernists who deny that “truth” exists, bear in mind that in criminal cases there is usually (but not always) a central truth to be found. Either Jane shot Barbara or she did not. My friend Peter Henning, hardly a post-modernist, did point out to me when he read a draft of my book that some crimes do not have a provable central truth. Whether two companies conspired to restrain trade is a legal determination and not an observable fact in the universe.

²² Letter from John J. Farmer, Attorney General of New Jersey, to All County Prosecutors, Col. Carson J. Dunbar, Jr., Superintendent, NJSP, All Police Chiefs, and All Law Enforcement Chief Executives (April 18, 2001), available at www.state.nj.us/lps/dcj/agguide/photoid.pdf.

²³ This paragraph is drawn from *id.*, *Composing the Photo or Live Lineup*, at 4–6.

Where that is not possible, the officer conducting the lineup must “be careful to avoid inadvertent signaling to the witness of the ‘correct’ response.” Second, the witness should be given a “none of the above” choice and told that the perpetrator might not be among those in the lineup or the photo array. Third, “when possible, photo or live lineup identification procedures should be conducted sequentially...rather than simultaneously.” Fourth, the officer should take care that the fillers are similar in appearance. Then there are suggestions about how the lineup or photo array should be conducted, twelve rules for lineups and nine for photo arrays.

In 2002, a year after New Jersey imposed these new requirements, North Carolina Chief Justice I. Beverly Lake, Jr. invited members of law enforcement, criminal justice, and the legal academy to join him in a “round-table discussion on the topic of wrongful convictions.”²⁴ Chief Justice Lake took note of the growing number of exonerations that “challenge us to further review our criminal justice system for potential changes which can minimize future convictions of the innocent, without jeopardizing the conviction of the guilty, and also establish a mechanism for objective review of credible innocence claims.”²⁵ The North Carolina Actual Innocence Commission was thus formed. One product of this remarkable coalition of differing perspectives was a report on the problem of eyewitness identifications.²⁶

The North Carolina report led to a bill to reform eyewitness identification procedures, which became law in 2007 and took effect in March 2008.²⁷ Because, as far as I can tell, no one has written in detail about the North Carolina eyewitness identification procedures,²⁸ I will present them here as they are the best I have seen. The statute requires that the procedure be conducted by an independent administrator or by an alternative method as provided elsewhere in the statute.²⁹ An “independent administrator” is defined as a “lineup administrator who is not participating in the investigation of the criminal offense and is unaware of which person in the lineup is the suspect.”³⁰ A police officer who is not involved in the case could thus qualify.

²⁴ Christine C. Mumma, *The North Carolina Actual Innocence Commission: Uncommon Perspectives Joined By a Common Cause*, 52 DRAKE L. REV. 647, 648 (2004).

²⁵ *Id.* at 649 (quoting letter from North Carolina Chief Justice I. Beverly Lake, Jr., to North Carolina law enforcement and criminal justice representatives 1 (Oct. 22, 2002) (on file with Christine C. Mumma)).

²⁶ The Innocence Project, *North Carolina Actual Innocence Commission Recommendations for Eyewitness Identification*, http://www.innocenceproject.org/docs/NC_eyewitness.pdf.

²⁷ See N.C. GEN. STAT. § 15A-284.52 (2008).

²⁸ For a summary of various proposals to improve eyewitness identifications, including that in North Carolina, I recommend Sandra Guerra Thompson, *What Price Justice? The Importance of Costs to Eyewitness Identification Reform*, 41 TEX. TECH L. REV. 33 (2008).

²⁹ N.C. GEN. STAT. § 15A-284.52(b)(1) (2009).

³⁰ *Id.* at § 15A-284.52(a)(3).

The independent administrator is required to instruct the eyewitness that:

- a. [t]he perpetrator might or might not be presented in the lineup,
- b. [t]he lineup administrator does not know the suspect's identity,
- c. [t]he eyewitness should not feel compelled to make an identification,
- d. [i]t is as important to exclude innocent persons as it is to identify the perpetrator, and
- e. [t]he investigation will continue whether or not an identification is made.”³¹

The North Carolina statute is very much about keeping a record of what transpires. To that end, the witness is asked to acknowledge receipt of these instructions in writing.³²

Other requirements include that five fillers must be used both in live line-ups and photo arrays—four fillers are generally used in lineups today—and that the same fillers cannot be used in two lineups with the same eyewitness.³³ In cases of multiple eyewitnesses, the suspect must be placed in a different position in the lineup for each eyewitness.³⁴ An important aspect of how the procedure is performed is that the witness who identifies a person or a photo will be asked, at the time of the procedure, to give a statement “in the eyewitness’s own words, as to the eyewitness’s confidence level that the person identified in a given lineup is the perpetrator.”³⁵ This becomes part of the record that the defense lawyer can use in preparing the defendant’s case.

Again in the record-keeping department, “a video record of live identification procedures” is required unless it “is not practical.”³⁶ In that case, “the reasons shall be documented, and an audio record shall be made. If neither a video nor audio record are practical, the reasons shall be documented, and the lineup administrator shall make a written record of the lineup.”³⁷ In addition, the record must include the following:

- a. All identification and nonidentification results obtained during the identification procedure, signed by the eyewitness, including the eyewitness’s confidence statement. If the eyewitness refuses to sign, the lineup administrator shall note the refusal of the eyewitness to sign the results and shall also sign the notation.

³¹ *Id.* § 15A-284.52(b)(3).

³² *Id.*

³³ *Id.* § 15A-284.52(b)(5)(b)–(d).

³⁴ *Id.* § 15A-284.52(b)(6).

³⁵ *Id.* § 15A-284.52(b)(12).

³⁶ *Id.* § 15A-284.52(b)(14).

³⁷ *Id.*

- b. The names of all persons present at the lineup.
- c. The date, time, and location of the lineup.
- d. The words used by the eyewitness in any identification, including words that describe the eyewitness's certainty of identification.
- e. Whether it was a photo lineup or live lineup and how many photos or individuals were presented in the lineup.
- f. The sources of all photographs or persons used.
- g. In a photo lineup, the photographs themselves.
- h. In a live lineup, a photo or other visual recording of the lineup that includes all persons who participated in the lineup.³⁸

Thus, unlike the plight of defense lawyers in other states, a defense lawyer in North Carolina will have a record of what happened during an eyewitness identification procedure. It will provide enormously helpful information that will permit effective cross-examination of witnesses who were hesitant or who changed their minds. And the witness who says at the time of the identification that she is only somewhat sure of the identification will not be able to deny saying that at trial.

I turn now to the alternative procedures contemplated by the North Carolina statute to be used in lieu of an independent administrator. The alternative procedure must be one that has been "specified and approved by the North Carolina Criminal Justice Education and Training Standards Commission."³⁹ The statute gives two examples. First, "[a]utomated computer programs [can] automatically administer the photo lineup directly to an eyewitness and [also] prevent the administrator from seeing which photo the witness is viewing until after the procedure is completed." Second, "photographs are placed in folders, randomly numbered, and shuffled and then presented to an eyewitness such that the administrator cannot see or track which photograph is being presented to the witness until after the procedure is completed."

Perhaps the most radical aspects of the North Carolina statute go to remedy. Both the New Jersey reforms and the North Carolina commission report make clear that a failure to follow the guidelines is not, in itself, a basis to suppress the resulting identification. Thus, as long as the minimal rights created by the Warren Court are respected (more on that in Part II), mistakes made by police in implementing the guidelines will not cause harm to the prosecutor's case in New Jersey, assuming the courts do not themselves create a suppression remedy. But the North Carolina legislature went further than the commission report—though Bob Mosteller wonders whether the legislature went "far enough"⁴⁰ and created both a soft suppression remedy and remedies that go to the weight of the evidence.

³⁸ *Id.* § 15A-284.52(b)(15).

³⁹ *Id.* § 15A-284.52(c).

⁴⁰ Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice,"* 76 *FORDHAM L. REV.* 1337, 1409 (2007).

Failure to comply with the procedures (apparently even good-faith failures) “shall be considered by the court in adjudicating motions to suppress eyewitness identification” and “shall be admissible in support of claims of eyewitness misidentification, as long as such evidence is otherwise admissible.”⁴¹ How judges should “consider” the failure to comply is not stated. The other two remedies are more clearly spelled out: “When evidence of compliance or noncompliance with the requirements of this section has been presented at trial, the jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine the reliability of eyewitness identifications.”⁴²

I think the North Carolina procedures are a tremendous stride forward, a substantial improvement over the good work that New Jersey accomplished in 2001. There is much to like here, particularly the “warnings” given to the eyewitnesses and the requirement that an elaborate record be kept. Imagine an eyewitness identification where the witness took a long time to choose someone, initially chose #2 and then changed to #3 with a tentative tone in her voice. In State *X*, which has made no reforms of its eyewitness procedures (you know who you are), the witness testifies at trial that, yes, she identified the defendant at a lineup held shortly after the crime was committed. But if the lineup was held prior to indictment or charges being filed, there is no right to counsel,⁴³ and the defense lawyer cannot effectively cross examine the eyewitness. He would not know that the witness hesitated, that she picked #2 originally, and that her tone was uncertain when she settled on #3. Asking if she was sure about the identification is bound to elicit “yes of course I was sure.” Fishing for ways she might not have been sure, “isn’t it true that you took a very long time to make up your mind?” are likely to do more harm than good. The witness will recognize the trap and deny that it took her a long time. Moreover, the judge will quickly run out of patience and cut the fishing trip short.

Now imagine a prosecution in North Carolina where the defense lawyer has seen the videotape of the procedure. He can ask the eyewitness why it took her so long, why she changed her mind, and why her tone was uncertain. If she denies the premises in the cross-examination, the lawyer can move to admit the videotape. Either way, her testimony would be undermined to a considerable degree, and the chance that the jury will discount, or ignore, the identification will increase. To be sure, the witness might have picked out the perpetrator even though she was hesitant and initially made the wrong choice, but the jury deserves to know how indecisive she was in making the identification. Over a universe of cases, the more indecisive the eyewitness is, the less reliable the identifications are likely to be.

I congratulate the North Carolina Chief Justice, the North Carolina Commission on Actual Innocence, and the North Carolina legislature for their yeoman work. I also congratulate John Farmer, who is now my dean, for getting

⁴¹ N.C. GEN. STAT. § 15A-284.52(d)(1)–(2) (2009).

⁴² *Id.* § 15A-284.52(d)(3).

⁴³ See *infra* note 55 and accompanying text.

the ball rolling in 2001. In my book, which was completed in 2007, I bemoaned the fact that so little attention was being paid to the problem of wrongful convictions. I missed what was going on in North Carolina. I am glad I have now discovered this important reform effort and have a chance to write about it.

But it seems to me that complying with this quite complex statute, with its onerous record-keeping duties, is a lot to ask of a police department, particularly a small department. One risk is that the police will stop conducting eyewitness identification procedures, with the attendant cost of making cases against guilty defendants harder to prove. Or, if the police conduct the procedures in violation of the rules, the costs might be quite severe in terms of lost convictions. Thus, I think we should look elsewhere than the police department to find “independent administrators.” I made a similar argument in my 2008 book. There, I argued that we should turn the eyewitness procedure over to a “screening magistrate,” a judicial function I created to implement several of the reforms I proposed.⁴⁴

My goal in this essay is more limited. I want only to facilitate reliable identification procedures and give defendants the ability to discover the State’s case, and to do both at the least possible cost to the State in terms of lost convictions of guilty defendants and added financial costs. Rather than create a new judicial office, I propose here to give the eyewitness procedure to the same judge who conducts preliminary hearings or, failing that, judges who conduct bail hearings. In federal court, that judge is a federal magistrate.⁴⁵ States assign the function of bail hearings and preliminary hearings variously, but one of those judges can be given the task of supervising the eyewitness procedures.

This idea makes so much sense that I am not sure how much I need to do to “sell” it to my readers. Put to one side the notion that “we’ve never done it this way,” and the inevitable push-back by judges who probably do not want another job, and police who would see this as an invasion of their “turf.” If we were building a system from scratch, knowing what we know about the problems of eyewitness identification, wouldn’t we assign the task of monitoring those procedures to a judge?

Sandy Guerra Thompson has noted that the eyewitness reform recommendations will require “training, personnel resources, and equipment” to “implement blind and sequential lineups or videotaped lineups.”⁴⁶ Whatever it would cost to train officers in all the police departments, the cost would be substantially less if judges were given the task of administering the procedures. A single judge could be assigned to administer procedures for several police departments. Using judges would of course produce a gain in police personnel resources because, other than providing suspects, and perhaps fillers, the police would be out of the business of eyewitness identifications.

Judges are accustomed to following complex rules and making a record of

⁴⁴ THOMAS, *supra* note 4, at 193–202.

⁴⁵ FED. R. CRIM. P. 5.1(a).

⁴⁶ Thompson, *supra* note 28, at 63.

what they do. They are independent of the police and will not know about the police investigation. Unlike the police officer who is ignorant of the suspect's identity, magistrates and preliminary hearing judges have no stake in the venture. They will presumably be indifferent as to whether or not the eyewitness picks someone out of the lineup or photo array.

I do not see any bias problem with the same judge supervising an eyewitness identification procedure and then sitting as a preliminary hearing judge in the same case. If the eyewitness procedure occurs first, as it almost always would, all the judge will have learned is that the eyewitness picked the defendant out of the lineup or photo array, or failed to do so, and the level of certitude that the witness had about the identification.⁴⁷ But all of that will be in the record that is required to be kept. Indeed, if we can get past the peculiarly American notion that judges should be a *tabula rasa* until the advocates on both sides have written on them, it actually makes more sense that the judge who will decide probable cause has observed the eyewitness procedure first-hand.

But if a state legislature is not persuaded that it makes sense to have the same judge both supervise the eyewitness procedures and judge the preliminary hearing, then the tasks can be rotated. The details can be worked out if a legislature can be persuaded that it makes sense to get police out of the business of conducting eyewitness identification procedures. The Supreme Court as far back as 1967 recognized the problem of letting police and prosecutors have carte blanche when conducting these procedures. The Court's remedy for the problem failed, as we will see in the next Part.

II. WADE REDUX AND REMADE

One of the virtues of using a judicial officer to supervise the eyewitness procedures created by North Carolina is that this accomplishes directly what the Supreme Court attempted to accomplish indirectly in 1967. In *United States v. Wade*,⁴⁸ the Court put the reliability problems with eyewitness identification out there for all the world to see. Quoting Felix Frankfurter, the Court in *Wade* observed:

'What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent—not due to the brutalities of ancient

⁴⁷ If a jurisdiction chooses to use as administrators judges who hold bail hearings, the bail determination might come before or after the eyewitness procedure. But I do not see how the bail hearing could compromise the judge's independence in administering the eyewitness procedure or how the latter could compromise the former.

⁴⁸ 388 U.S. 218, 228 (1967).

criminal procedure.’⁴⁹

And it is not just the substance of the identification that is of concern. The procedure itself is flawed: “[T]he confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial.”⁵⁰ The Court noted that a “major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. . . . Suggestion can be created intentionally or unintentionally in many subtle ways.”⁵¹ All of this is true enough, and the Court is to be commended for recognizing the dangers over forty years ago.

And what was the Court’s solution? It was to give defendants a right to counsel during these pretrial eyewitness identification procedures. In an earlier issue of this journal, I criticized the Court’s *Wade* solution as an ineffective way to improve reliability of eyewitness identifications.⁵² Today, however, I wish to concede the Court’s premise that having an observer from outside the police department would make the procedure more likely to yield reliable results. Here is part of the Court’s rationale for requiring the presence of counsel at lineups:

[T]he defense can seldom reconstruct the manner and mode of lineup identification for judge or jury at trial. Those participating in a lineup with the accused may often be police officers; in any event, the participants’ names are rarely recorded or divulged at trial. . . . [N]either witnesses nor lineup participants are apt to be alert for conditions prejudicial to the suspect. And if they were, it would likely be of scant benefit to the suspect since neither witnesses nor lineup participants are likely to be schooled in the detection of suggestive influences. Improper influences may go undetected by a suspect, guilty or not, who experiences the emotional tension which we might expect in one being confronted with potential accusers. . . . Moreover any protestations by the suspect of the fairness of the lineup made at trial are likely to be in vain; the jury’s choice is between the accused’s unsupported version and that of the police officers present. In short, the accused’s inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack

⁴⁹ *Id.* (quoting FELIX FRANKFURTER, *THE CASE OF SACCO AND VANZETTI* 30 (1927)).

⁵⁰ *Id.*

⁵¹ *Id.* at 228–29.

⁵² George C. Thomas III, *The Criminal Procedure Road Not Taken: Due Process and the Protection of Innocence*, 3 OHIO ST. J. CRIM. L. 169, 190 (2005).

the credibility of the witness' courtroom identification.⁵³

Notice how beautifully the North Carolina procedure ameliorates all of these deficiencies. We have a record of "the manner and mode of lineup identification,"⁵⁴ we have the names of the other participants, and defense counsel can judge for himself from the videotape whether improper influences were used. Moreover, using a judicial officer as the independent administrator reduces, far more than having defense counsel present, the likelihood that improper influences will be used. Pairing the North Carolina procedures with a judicial officer as the independent administrator accomplishes all that *Wade* sought and in a way that makes much more sense than using defense counsel to observe the procedure so that he can cross-examine the witness effectively later in court. With my proposal, we have the best of both worlds: A judicial officer conducts a set of procedures designed to prevent suggestiveness and then the defense counsel gets to review the videotape to prepare for cross-examination.

At the same time, the cost to the State in terms of lost convictions seems manageable. There is no hard and fast exclusionary rule. That decision can be left to the judge, as indeed it is for all suppression questions in Canada and the United Kingdom. In a case where the State has abundant evidence of guilt, the prosecutor might decide not to use an identification in which the witness was indecisive or one where the statutory requirements were not followed. If the prosecutor decides to use an identification taken in violation of the statute, a judge might very well exclude it if the other evidence is abundant. But, hopefully, if the State's case is thin and circumstantial, the judge would courageously suppress the identification taken in violation of the statute.

In any event, I come to praise *Wade*, not to bury it. Whether I was right in 2005 or the Court was right in 1967 about the ability of counsel to prevent unreliable misidentifications, the Court's unwillingness to apply *Wade* to pre-charge procedures in *Kirby v. Illinois*⁵⁵ left the right to counsel toothless if not feckless. Because identification procedures are a police investigative tool, usually designed to tell the police whether to continue building a case against the suspect, post-indictment lineups are rare. Whatever benefit *Wade* might have provided if the Court could have found five votes to extend it to all identification procedures, after *Kirby* it provided almost no benefit.

Next I will recommend a right to discover the State's case that is roughly analogous to civil discovery. When I first had this idea, I thought it would be a bridge too far, that state legislatures would, like Congress, resist robust defense discovery for fear of witness intimidation and outright tampering by defendants,

⁵³ *Wade*, 388 U.S. at 230–32 (citations omitted).

⁵⁴ *Id.* at 230.

⁵⁵ 406 U.S. 682, 690 (1972) (plurality). While the opinion delivering the judgment in *Kirby* was joined by only four justices, the Court has never even intimated unhappiness with the refusal to extend *Wade* to pre-charge lineups, and the issue appears to be settled.

many of whom are not exactly model citizens. So I was very surprised when Dan LeCours, a research assistant, turned up robust defendant discovery systems in several states.⁵⁶ How well they work, and how often they are used, are issues that defied our best attempt to gather much information. But they are there, clear signs that legislatures are sometimes willing to give criminal defendants what civil litigants take for granted—a chance to discover, and probe, the other party's case before trial begins.

III. LIFTING THE VEIL OF IGNORANCE BY DISCOVERING THE STATE'S CASE

Permitting reasonably robust discovery would serve as a backstop in cases and states that fail to provide meaningful protection against flawed identifications. While it is undoubtedly better to have a system in place that prevents a misidentification, one way to reveal potentially flawed identifications is to be able to depose the eyewitness before trial. In civil depositions, as parties to them know only too well, “fishing expeditions” are standard fare. Extending the right to depose witnesses to criminal cases would allow the defense lawyer to ask as many questions as she wishes about the witness' opportunity to observe the perpetrator and about the identification procedure. There would be no judge to shut down what might appear to be fanciful lines of inquiry. More importantly, the witness is more likely to be candid in a room with a stenographer and a couple of lawyers than in a courtroom in front of judge, jury, and the press. Put another way, the witness is less on guard because the apparent informality of the deposition makes it seem less important.

But discovery is more than a backstop against flawed identifications. There will be many cases where it will be useful to depose a witness other than an eyewitness. The one that comes to mind first is the case built on a jailhouse snitch, the fourth most common cause of wrongful convictions. Imagine a lawyer with good cross-examination skills having the luxury of deposing the snitch; “Now, Mr. Snitch, you decided that you could get *X* deal if you went to the authorities with information incriminating my client before you had this so-called conversation with him, isn't that true?” The defense would also have ample time and latitude to explore the snitch's background, including examples of times he has lied to get what he wants. And the defense lawyer could uncover names of other prisoners with whom the snitch had spoken. If, like most criminals, the snitch had been unable to keep his mouth shut, the defense might learn that others were aware of his intent to get the defendant even if he had to lie to do so.

I realize that robust discovery will benefit the guilty defendant as well as the innocent one. But that leaves me untroubled. Not every criminal justice reform has to be solely focused on innocent defendants. Having robust discovery is viewed as a matter of basic fairness in civil cases, and I believe it can be defended

⁵⁶ The states are identified in Part III.

on the same grounds in criminal cases.

A modest beginning in defense discovery would be the right to a list of prosecution witnesses. You might think that every jurisdiction requires the prosecution at least to tell the defendant who will testify against him. But you would be wrong. Twenty states and the federal government have no formal requirement that the prosecutor disclose his witness list. To be fair, there is a reason to have more restrictive discovery in criminal cases than civil. Arthur T. Vanderbilt, Chief Justice of the New Jersey Supreme Court from 1948 to 1957, was an early and passionate advocate of broad civil discovery.⁵⁷ But even he conceded that the calculus changed in criminal cases because “many witnesses, if they know that the defendant will have knowledge of their names prior to trial, will be reluctant to come forward with information during the investigation of the crime.”⁵⁸

The pressure on witnesses, and the possibility of witness tampering, is probably greatest at the federal level. Federal crimes tend to involve large-scale criminal enterprises, many of which have ties to organized crime. Intimidating, and even killing, potential witnesses is not beyond the imagination or the ability of those who control billions of dollars in illicit funds.⁵⁹ There is a reason that the federal government created a Witness Protection Program.

One can see the power of this argument in the reaction of Congress when the Supreme Court recommended changing Federal Rule of Criminal Procedure 16, the discovery rule, to give defendants the right to demand a witness list from the government.⁶⁰ The Department of Justice opposed the witness list provision passionately, quoting many United States Attorneys who called it “‘dangerous’ and ‘frightening,’ an invitation to ‘bribery and obstruction of justice’ . . . and the ‘manufacturing of defenses.’”⁶¹ Responding to these concerns, the House amended Rule 16 to allow discovery only within three days of trial.⁶² But the

⁵⁷ See ARTHUR T. VANDERBILT, *CASES AND OTHER MATERIALS ON MODERN PROCEDURE AND JUDICIAL ADMINISTRATION* 10 (Washington Square Publishing Corporation 1952) (noting purpose of the rules of discovery was to facilitate “an orderly search for the truth in the interest of justice rather than a contest between two legal gladiators with surprise and technicalities as their chief weapons”).

⁵⁸ *State v. Tune*, 98 A.2d 881, 884 (N.J. 1953) (citation omitted).

⁵⁹ In fiscal year 2007 there were over 250 federal defendants who were charged under either 18 U.S.C. § 1512, Tampering with a Witness, Victim, or an Informant, or 18 U.S.C. § 1513, Retaliating Against a Witness, Victim, or an Informant. These figures are derived from the dataset compiled by the Administrative Office of the U.S. Courts, and maintained by the Federal Justice Statistics Resource Center, <http://fjsrc.urban.org/download.cfm>. The database is named adj07out.

⁶⁰ WARREN E. BURGER, PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE, H.R. DOC. NO. 93-292, at 14 (1974) (proposed Rule 16 (E)).

⁶¹ *Proposed Amendments to Federal Rules of Criminal Procedure: Hearing Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary*, 93d Cong. 49 (1974) (statement of W. Vincent Rakestraw, Assistant Att’y Gen., Office of Legislative Affairs).

⁶² JAMES R. MANN, FEDERAL RULES OF CRIMINAL PROCEDURE AMENDMENTS ACT OF 1975, H.R. REP. NO. 94-414, at 12 (1975) (Conf. Rep.).

Senate eliminated the witness list provision entirely, and the Conference Committee accepted the Senate's version, citing as "paramount concerns" the "[d]iscouragement of witnesses and improper contacts directed at influencing their testimony."⁶³

More than half of the states require disclosure of the prosecution's witnesses. A 2008 survey of state practices disclosed that thirty states, and the military courts, granted defendants the right to discover "all prosecutor witnesses," "all witnesses," or "all persons having knowledge of relevant facts who may be called by the state as witnesses at the trial."⁶⁴ The latter, remarkably broad, provision is Idaho's.⁶⁵

A mere list of potential witnesses, while helpful, is obviously not going to help a defendant nearly as much as being able to depose those witnesses. Dan LeCours found six states that permitted defendants to depose all prosecution witnesses⁶⁶ and five others that permitted discovery upon leave of the court.⁶⁷ The following brief description of two of the state approaches is drawn from LeCours's work.

Vermont enacted one of the earliest statutes permitting the use of discovery depositions by defendants.⁶⁸ The key provision of the 1961 statute allowed defendants to move to depose witnesses whose "testimony may be material or relevant on the trial or of assistance in the preparation of his defense."⁶⁹ Once a defendant made a showing that a deposition might assist in the preparation for trial, the judge "shall order that the testimony of the witness be taken by deposition." Though the legislature subsequently placed a few restrictions on the right to depose prosecution witnesses, the Vermont statute still gives defendants a broad discovery right.

Bradford Middlekauff concluded from his study of criminal discovery that "Florida has the broadest criminal discovery of any large state in the union."⁷⁰ The distinction Middlekauff draws between populous states and rural states is a sensible one. A discovery process that might work just fine in Vermont could pose an administrative nightmare in a more populous state. Indeed, of the six states that

⁶³ See 1975 U.S. CODE CONG. & ADMIN. NEWS 716.

⁶⁴ Stephen D. Easton & Kaitlin A. Bridges, *Peeking Behind the Wizard's Curtain: Expert Discovery and Disclosure in Criminal Cases*, 32 AM. J. TRIAL ADVOC. 1, app. III at 35–36 (2008) (Prosecution's Duty to Identify Experts (or All Witnesses)).

⁶⁵ *Id.*

⁶⁶ FLA. R. CRIM. P. 3.220(h)(1)(A) (2009); IND. CODE ANN. § 35–37–4–3 (West 2004); IOWA R. CRIM. P. 2.13(1) (2002); MO. R. CRIM. P. 25.12 (2009); N.D. R. CRIM. P. 15 (LexisNexis 2008–9); VT. R. CRIM. P. 15 (LexisNexis 2009).

⁶⁷ ARIZ. R. CRIM. P. 15.3; NEB. REV. STAT. ANN. § 29-1917(1) (LexisNexis 2009); N.H. REV. STAT. ANN. § 517:13 (2007); OHIO REV. CODE ANN. § 2945.50 (LexisNexis 2006); TEX. CODE CRIM. P. ANN. art. 39.02 (Vernon 2005).

⁶⁸ VT. STAT. ANN. tit.13, §§ 6721–6727 (repealed 1973).

⁶⁹ *Id.*

⁷⁰ Wm. Bradford Middlekauff, *What Practitioners Say About Broad Criminal Discovery Practice: More just—or just more dangerous?*, 9 Crim. Just. 14, 55 (1994).

permit defendants to depose all prosecution witnesses, four of them are primarily rural—Iowa, Missouri, North Dakota, and Vermont. As of 2008, Florida was the eighth most densely populated state in the nation, far ahead of the second most densely populated state to permit discovery of prosecution witnesses, Indiana at number sixteen.⁷¹ Thus, Florida is a useful test case to see if discovery can work in a state that is densely populated.

Florida enacted its defense discovery statute in 1972, largely drawing on the American Bar Association's (ABA) Minimum Standards on Criminal Justice.⁷² The ABA Standards did not, however, recommend the use of discovery depositions as of right,⁷³ and the reasons Florida offered a more expansive discovery right are not clearly stated in its rules or the Florida Supreme Court opinion adopting the rules.⁷⁴ Two years later, the Uniform Rules of Criminal Procedure recommended defense discovery depositions as a matter of right.⁷⁵ The commentary to the Uniform Rules states that the permissive use of discovery depositions was particularly justified in light of the Uniform Rules' elimination of preliminary hearings.⁷⁶ The drafters concluded that discovery depositions were both cheaper and more efficient than preliminary hearings and served many of the same purposes.⁷⁷ Interestingly, Florida does not require preliminary hearings.

I think it obvious that, for defendants, deposing prosecution witnesses is far preferable to preliminary hearings. The scope of questioning can be much broader in a deposition than in a preliminary hearing where the judge is eager to move on to the next case. Even more important, prosecutors will naturally seek to hide weaknesses in the cases they present to the preliminary hearing judge. If the low standard of probable cause can be met without putting on the State's weakest witnesses, then that is how the prosecutor will usually proceed.⁷⁸ The value of defense depositions is that the defense lawyer is the party who decides what witnesses to question; the prosecutor cannot hide weak witnesses.

Florida's discovery process, like most of the others, has evolved and become

⁷¹ Worldatlas.com, *United States (by highest population density)*, <http://www.worldatlas.com/aatlas/populations/usadensityh.htm> (last visited Apr. 7, 2010).

⁷² *In re Fla. Rules of Criminal Procedure*, 272 So. 2d 65, 108–10 (Fla. 1972).

⁷³ AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL § 2.5 cmt. at 87–88 (Supp. 1970).

⁷⁴ See *In re Fla. Rules*, 272 So. 2d 65. There is a suggestion in the state court's opinion that the wide-open discovery right was already in Florida's rules, but the prior right was triggered only when a State's witness refused to give a signed statement. *Id.* at 110. The right to take depositions even when the witness provides a written statement is, obviously, both highly beneficial to defendants and a pretty dramatic change from Florida's prior law.

⁷⁵ UNIF. R. CRIM. P. MODEL PENAL CODE R. 431 (1974).

⁷⁶ *Id.* at 131.

⁷⁷ *Id.*

⁷⁸ I suspect that prosecutors sometimes put their weak witnesses on the stand in a preliminary hearing to see how well they can bear up under cross-examination. But given the natural distaste for losing, it is probably a relatively rare occurrence.

considerably more complex over the years. For example, Florida now recognizes three categories of witnesses, and the defendant's discovery rights vary depending on category. The details of the evolution of these discovery schemes and their present form are beyond the scope of this essay. The critical point is that in six states, defendants can routinely depose witnesses who will be instrumental in proving the State's case. I think Florida's comprehensive statute, last amended in 2005, is the best of the lot.

How well do these discovery schemes work in practice? Here I have incomplete information but will present what I have, again thanks to Mr. LeCours. A prominent Vermont defense attorney tells of a case where, through discovery depositions the prosecutor learned that the defendant, who had been charged with rape, was more than 200 miles away at a bachelor's party when the crime occurred.⁷⁹ According to a news account: "In the end, the prosecutor apologized" to the defendant.⁸⁰ Presumably, that information would have come out at trial and the jury would have acquitted. But there is the risk that in the adversarial trial setting, the prosecutor might have successfully undermined the alibi witnesses, and, in any event, isn't it better not to force an innocent defendant to trial?

In the 1960's, when Vermont's procedure had just begun, one criminal defense lawyer reported that he had taken discovery depositions in 20 out of 250 criminal cases he had handled.⁸¹ He explained that his percentage was high compared to other members of the Vermont Bar.⁸² A different experience was reported in Iowa, where a former Iowa prosecutor reported that defense counsel opted for discovery depositions in nearly eighty-five percent of cases she handled in the 1990's.⁸³ She even suggested that defense attorneys were afraid not to take depositions for fear that they would be accused of nonfeasance.⁸⁴

An indirect measure of the frequency of defense depositions in Florida can be found in a report of the Florida Department of Law Enforcement concluding that, in 1987, discovery depositions cost police departments statewide 750,000 lost police man-hours.⁸⁵ A rough approximation of the number of serious crimes in Florida in 1987 is 350,000.⁸⁶ That would be about two police hours per case, a rate

⁷⁹ Sally Johnson, *Depositions Can Be Ordeal as Well as a Protection*, N.Y. TIMES, Mar. 8, 1991, at B5.

⁸⁰ *Id.*

⁸¹ Peter Forbes Langrock, *Vermont's Experiment in Criminal Discovery*, 53 A.B.A. J. 732, 733 (1967).

⁸² *Id.*

⁸³ Aaron Chambers, 'Prosecutorial Misconduct' Panel Draws More Fire, CHI. DAILY L. BULL., Sept. 18, 2000, at 20.

⁸⁴ *Id.*

⁸⁵ See John F. Yetter, *Discovery Depositions in Florida Criminal Proceedings: Should They Survive?*, 16 FLA. ST. U. L. REV. 675, 684 (1988).

⁸⁶ The earliest Florida crime data I found was for 1993. To get an estimate of "serious crimes," I combined violent index crimes (murder, forcible sex offenses, robbery, and aggravated assault) and what Florida calls "mandatory offenses." For 1993, this totaled about 470,000 crimes.

suggesting either that depositions were being taken in most serious cases or that the average time for deposing police officers is much longer than two hours per case. To be sure, travel and waiting time might absorb well over an hour on average, which would reduce the actual time being deposed to less than one hour.

In 2002, the Missouri Public Defender System spent \$490,874 in fees and expenses on discovery depositions.⁸⁷ The Cape Girardeau County Prosecuting Attorney's Office⁸⁸ estimates that it spends \$4,575 per year on deposition transcripts alone.⁸⁹ These figures suggest that defense depositions are taken fairly often. They also shine a light on the elephant in the room. Who pays for the discovery depositions, both in terms of out-of-pocket expense and lawyer time, when the defendant is indigent?

Florida not only went farther than the ABA standards in creating a right to depose the prosecution witnesses, but also took a big step when it required that the costs be borne by the State.⁹⁰ If indigent defendants had to pay, or share, the cost of the stenographer and producing the transcript for a deposition of each witness, it is difficult to imagine indigent defendants taking substantial advantage of the right to depose the State's witnesses. North Dakota has joined Florida in taxing the costs to the State,⁹¹ while Iowa and Missouri have refused to pay for depositions from state funds.⁹² There is no indication that Indiana pays any expenses and so it is fair to put Indiana in the list of states that do not pay. Vermont pays travel expenses for the defendant and his lawyer but nothing else.⁹³

But even in Florida and North Dakota, a funding problem remains. There is a huge literature to the effect that overworked public defenders are already stretched so thin that they struggle to provide even minimally effective assistance of counsel.⁹⁴ In 2009, the National Right to Counsel Committee issued a report

See Fla. Dept. of Law Enforcement, *Crime in Florida, 1994 Annual Report*, available at http://www.fdle.state.fl.us/Content/FSAC/UCR/1994/1994_crime_in_florida-pdf.aspx. In the 1980s, Florida's population increased about 33% or about 3.3% per year. State of Florida, *Florida Quick Facts*, Florida Population, available at <http://www.stateofflorida.com/Portal/DesktopDefault.aspx?tabid=95#27103> (population gain of almost 3,200,000 from a base of 9,750,000) (last visited Apr. 12, 2010). If that growth rate held true for the period 1986 to 1993, it would give a population change of 26% (3.3% x 8 years). If we assume that crime rates over short periods roughly track population growth, then we can get an estimate of the crime rate in 1986 by reducing the serious crimes in 1993—470,000—by 26%. This gives a figure of 348,000 and I rounded to 350,000 in the text—obviously a very rough estimate.

⁸⁷ See H. Morley Swingle, *Depositions in Criminal Cases in Missouri*, 60 J. Mo. B. 128, 134 (2004).

⁸⁸ Cape Girardeau County has roughly 70,000 residents. See United States Census Bureau statistics, available at <http://www.census.gov/popest/counties/tables/CO-EST2008-01-29.xls>.

⁸⁹ Swingle, *supra* note 87, at 134.

⁹⁰ See FLA. R. CRIM. P. 3.220(o) (2000).

⁹¹ See N.D. R. Crim. P. 15(g) (2008).

⁹² See IOWA R. CRIM. P. 2.13 (2002); MO. R. CRIM. P. 25.12(a) (2009).

⁹³ VT. R. CRIM. P. 15(e) (1973).

⁹⁴ See, e.g., Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases*, A

entitled *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*.⁹⁵ The committee included prosecutors, judges, defense lawyers, and academics. The report details systemic and endemic failures of indigent defense in this country. It found "overwhelming" evidence that, in most of the country, "quality defense work is simply impossible because of inadequate funding, excessive caseloads, a lack of genuine independence, and insufficient availability of other essential resources."⁹⁶ It provides twenty-two recommendations for improvement,⁹⁷ most of which cost money that states do not have as they struggle to survive the Great Recession.

It is fairly common in the big cities (and this parameter eliminates Iowa, Vermont, and North Dakota from the problem list) for public defenders to have hundreds of open cases at any given time. For example, "[i]n January 2008, the Nevada Supreme Court ordered the two largest counties in the state to perform weighted caseload studies after finding that, 'by any reasonable standard, there is currently a crisis in the size of the caseloads for public defenders in Clark County [Las Vegas] and Washoe County [Reno].'"⁹⁸ The studies concluded that "[i]n Clark County, in 2006, the average public defender's caseload was 364 felony and gross misdemeanor cases; in Washoe County, the average caseload was 327 felony and gross misdemeanor cases."⁹⁹ In Knox County, Tennessee, in one year "six misdemeanor attorneys handled over 10,000 cases, averaging just less than one hour per case."¹⁰⁰

To meet with that number of clients, to do even minimal investigation, and to engage in plea negotiations with the prosecutor, must exhaust every working minute. And every time a case is closed, a new one takes its place. Taking depositions is a labor intensive process. If the State has, on average, three witnesses per case, and if the average defender handles three hundred cases a year, that creates the potential of nine hundred depositions. To prepare for, travel to, and conduct even a simple deposition probably takes three hours. So, thanks to the right to depose the State's witnesses, we have potentially added almost 3,000 hours to the defender's schedule, which is equivalent to 75 weeks at 40 working hours per week.

If our hypothetical public defender with three hundred cases does nothing else, and does not get a new case for a year and one half, she can conduct

National Crisis, 57 HASTINGS L.J. 1031 (2006); George C. Thomas III, *When Lawyers Fail Innocent Defendants: Exorcising the Ghosts that Haunt the Criminal Justice Systems*, 2008 UTAH L. REV. 25.

⁹⁵ The Constitution Project, Report of the National Right to Counsel Committee, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, available at <http://tcpjusticedenied.org/>.

⁹⁶ *Id.* at 4.

⁹⁷ *Id.* at 183–213.

⁹⁸ *Id.* at 68.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

depositions in all of her cases. To be sure, a fairly large number of cases and witnesses in particular cases can probably be eliminated as candidates for depositions. Many cases in which the client does not deny the critical facts fall off the list. Cases where the defendant is willing to take a plea offer early in the process fall off the list. Drug cases and prostitution cases where the witness will be a police officer are unlikely candidates for a deposition that will do the defendant much good.

Still, once we realize that public defenders in big cities cannot genuinely service the clients that they have now, without a single added deposition, it is plain that big city public defenders are not going to be taking a lot of depositions. Hopefully, when persuaded of their client's innocence, public defenders will sacrifice some other chore and depose the State's witnesses, but what an awful burden to put on the defender's shoulders. She must, first, decide which of her clients are innocent and, then, figure who to shortchange to find the time to take depositions in those cases. Hopefully, the innocent defendants who cannot pay for a lawyer, or persuade the public defender to take depositions, can find help at an Innocence Project or law school clinic. But all of that is too hit or miss to please me.

Thus, just as I did with the otherwise excellent North Carolina eyewitness statute, I would suggest a major addition to the discovery statute in Florida (and in other states as well). If a defendant makes a threshold showing of innocence, the state should pay the lawyer time involved in taking the depositions of the State's witnesses. As for what constitutes a threshold showing of innocence, my book recommended a threshold of innocence for the review of convictions after they have become final.¹⁰¹ There, because the prisoner has been convicted, and his conviction affirmed on appeal, I argued that he should bear "the burden of proving by a preponderance of the evidence that he is innocent."¹⁰²

But when the issue is whether to pay the lawyer time for taking depositions prior to trial, the threshold showing of innocence should not be nearly that high. We are now in the mode of protecting a possibly innocent person from a wrongful conviction and should thus err on the side of defendants. I think something along the lines of substantial evidence of innocence would be the right standard. For example, in *Chambers v. Mississippi*,¹⁰³ someone other than the defendant initially confessed to the murder and then recanted his confession. That should easily count as substantial evidence of innocence, and a state should pay the lawyer time to depose the person who first confessed. A defendant who files a sworn affidavit from an alibi witness has demonstrated substantial evidence of innocence. So, too, has a defendant who can demonstrate that the eyewitness identification procedures were not followed and that the resulting identification is thus flawed, unless the State can rebut his showing with other, powerful evidence.

¹⁰¹ THOMAS, *supra* note 4, at 220–22.

¹⁰² *Id.* at 220.

¹⁰³ 410 U.S. 284 (1973).

In the end, I'd be content to leave this decision in the hands of the same judge who supervises eyewitness identification procedures. I suspect that the eyewitness process that is revealed in the North Carolina videotapes will come across as far less certain and accurate than the one that is now presented in court as a fait accompli in most states. If I am right about that, the judge who sees the halting, hesitant nature of many eyewitnesses will develop a keen appreciation for the fact that too many defendants may be innocent. We can safely leave the decision of whether defendants have shown substantial evidence of innocence in that judge's hands.

I return to *Chambers*, the case where someone else confessed to the murder, to note a potential problem with the scope of the right to discover the case against the defendant. The State in *Chambers* did not call the man who confessed the murder¹⁰⁴—why would it? Indeed, one issue was whether the defendant could call that witness and cross-examine him.¹⁰⁵ Thus, criminal discovery statutes should not be limited to witnesses whom the State plans to call but should be written as broadly as Florida's: "At any time after the filing of the indictment or information the defendant may take the deposition upon oral examination of any person who may have information relevant to the offense charged."¹⁰⁶

As for how the lawyer time would be paid, the simplest system would be to create a specialized department within the public defender's office that does nothing but take depositions. One attractive feature of that solution is that these deposition-defenders would quickly become very good at what they do and thus able to undermine prosecution witnesses who are less than candid. Another solution is the one that is used in some states to provide counsel for indigent defendants. The state can pay a per hour fee, with a maximum cap, to lawyers who are appointed to depose the State's witnesses. Lawyers in a particular jurisdiction can volunteer to be on the deposition list but, if insufficient numbers volunteer, judges can simply appoint from a list of all practicing lawyers.

IV. COSTS AND BURDENS OF CRIMINAL DISCOVERY

I now consider the added burden that depositions pose for witnesses and for the State. Criminal discovery depositions undeniably create significant potential for abuse, including harassment and intimidation, burdens that would, at a minimum, add to the already high levels of stress and emotional trauma that crime victims suffer. Depositions are traumatic experiences for all witnesses and more so for victims of crime, particularly violent crime, because they must relive the incident and also must face aggressive questioning. The trauma is undoubtedly exacerbated if the defendant is in the room.¹⁰⁷

¹⁰⁴ *Id.* at 284.

¹⁰⁵ *Id.* at 291-92.

¹⁰⁶ *In re Florida Rules of Criminal Procedure*, 272 So. 2d. 65, 107 (Fla. 1972).

¹⁰⁷ *See* Yetter, *supra* note 85, at 690-91; Johnson, *supra* note 79.

Susan Sweetser, a rape victim in Vermont, said in 1991 that the Vermont "deposition process is being badly abused by attorneys to harass and intimidate victims."¹⁰⁸ Part of the abuse in her case was that some of the questions were intensely personal and irrelevant (e.g., her mental health, the condition of her marriage, and where she had attended high school).¹⁰⁹ She said to a reporter: "You tell me what any of that had to do with [me] being raped."¹¹⁰ Jeffrey Amestoy, Vermont's Attorney General in 1991, agreed that depositions can be "enormously traumatic to victims."¹¹¹ He concluded: "Depositions were intended to be devices to help seek the truth, but now they contribute to trial by ordeal."¹¹² To deal partly with the intimidation problem, most states now restrict defendants' ability to be present at the deposition,¹¹³ and have provisions to protect special groups of witnesses, in particular children.¹¹⁴ Rape victims are also protected by rape shield laws, which forbid questioning about their sexual history.¹¹⁵

Then there is the problem of defense lawyers abusing the deposition process to gain strategic advantage. Ms. Sweetser, a law clerk, said that "[d]efense lawyers figure if you can delay a case long enough, maybe you can make the victim go away."¹¹⁶ One does have to be unduly cynical to imagine that defense lawyers with clients who can pay hourly rates will be tempted to delay trial as long as possible, and a deposition process gives them an added weapon.

Thus, there is no doubt that victims bear an additional and sometimes heavy burden in states that permit criminal depositions. In some cases, witnesses might decide not to undergo a deposition or, having undergone one, not to testify at trial. Most of those cases would have to be dismissed. There are also significant financial costs to the state, as we saw in Part III, costs that would be increased if a legislature agreed to pay the lawyer time for defendants who make a threshold showing of innocence.

Before society began to appreciate the extent to which innocent defendants are convicted, these costs and burdens could have been seen to outweigh the benefit of being fair to (almost always) guilty defendants who would, after all, get their day in court if they wished. Indeed, the federal government and thirty-nine or

¹⁰⁸ Johnson, *supra* note 79.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See, e.g., FLA. R. CRIM. P. 3.220(h)(7) (1973) (providing that defendants may only be present upon consent or upon "a showing of good cause"); MO. R. CRIM. P. 25.12(c) (2009) (same).

¹¹⁴ See, e.g., FLA. R. CRIM. P. 3.220(h)(4) (1973) (providing for videotaped depositions of witnesses under 16); VT. R. CRIM. P. 15(f)(2) (2009) (providing for depositions in the presence of a special master for specific children witness and victims); IOWA R. CRIM. P. 2.13(2)(b) (2002) (limits the persons who can be present during the deposition of a child).

¹¹⁵ See Swingle, *supra* note 87, at 131.

¹¹⁶ Johnson, *supra* note 79.

so states do not permit depositions in criminal cases, probably in recognition of these added burdens and costs. But now that we know that a non-trivial number of innocent defendants are convicted, the benefit of permitting those defendants a greater chance to prove their innocence shifts the balance in favor of permitting criminal defense depositions.

Being a witness or complainant in a criminal case has for centuries carried both burdens and risks. In thirteenth century England, trial by battle was the default form of proof when one private party accused another of felony. The accused could choose a jury but, if he did not, the accuser faced a battle that would last from sunrise until one was vanquished or the sun set.¹¹⁷ If the accused was vanquished, he was “adjudged to be hanged immediately.”¹¹⁸ But if he fought until sunset or if he vanquished the complainant, he was acquitted and recovered damages from the complainant who also lost his rights to be put on a jury or to testify as a witness.¹¹⁹ After trial by battle disappeared, for hundreds of years in England and then America, the failure of a search warrant to uncover stolen goods created tort liability for the person who swore before the justice of the peace who issued the warrant that stolen goods would be found in a particular house.¹²⁰

If DNA testing could be performed in all cases, then the system would not need to consider additional steps to protect the innocent. But DNA is helpful only when serological evidence is left behind. Those who commit property crimes are very unlikely to leave behind evidence that can be tested for DNA, and the 2007 FBI index crime figures show that property crimes outnumber violent crimes by seven to one.¹²¹ Giving defendants in non-DNA cases the means to demonstrate their innocence is a benefit of almost incalculable value. What is the value of saving Rickie Johnson the twenty-five years he spent in prison? Whatever that value is, one must multiply by thousands each year. To me, that justifies burdening victims with a discovery process as long as it is tightly regulated to reduce the burden as much as possible.

V. CONCLUSION

The world of criminal justice, for me, changed forever when I read the Institute of Justice monograph showing an error rate of one in four when the DNA of the suspect was compared to DNA taken from the crime scene.¹²² In my view, we simply have to do more to screen innocent defendants from the system prior to

¹¹⁷ ROBERT BARTLETT, TRIAL BY FIRE AND WATER 108 (1986).

¹¹⁸ WILLIAM BLACKSTONE, 4 COMMENTARIES *348.

¹¹⁹ *Id.*

¹²⁰ *See, e.g.,* Simpson v. Smith, 2 Del. Cas. 285, 291 (Del. Ct. Err. & App. 1817); Bostock v. Saunders, 95 Eng. Rep. 1141 (K.B. 1773).

¹²¹ Federal Bureau of Investigation, 2007 *Crime in the United States, National Data*, tbl. 1, available at http://www.fbi.gov/ucr/cius2007/offenses/standard_links/national_estimates.html.

¹²² *See supra* text accompanying note 7.

conviction. This essay presents two proposals designed to accomplish that goal. Neither is, I think, radical.

When seeking to improve the accuracy of eyewitness identification procedures, I drew heavily on a 2007 North Carolina statute, adding only that the independent administrator be a judicial officer rather than a police officer. North Carolina does not have a reputation for being radical in criminal justice matters. For my idea that criminal discovery should be broadened, particularly to include the right to depose the prosecution's witnesses, I relied on a Florida discovery procedure that has been in place since 1972. Moreover, ten other states permit criminal depositions either as a matter of right or on leave of the court. Those states are Arizona, Indiana, Iowa, Missouri, Nebraska, New Hampshire, North Dakota, Ohio, Texas, and Vermont.¹²³ These are states from the heartland and New England, hardly hotbeds of radical steps to undermine law enforcement.

Thus, both of these reforms are achievable. The academy and criminal justice policy makers need to make a case before the various legislatures that it is time to we face the consequences of what DNA has revealed: our criminal justice system fails to separate the innocent from the guilty far, far too often.

¹²³ See *supra* notes 66–67.

